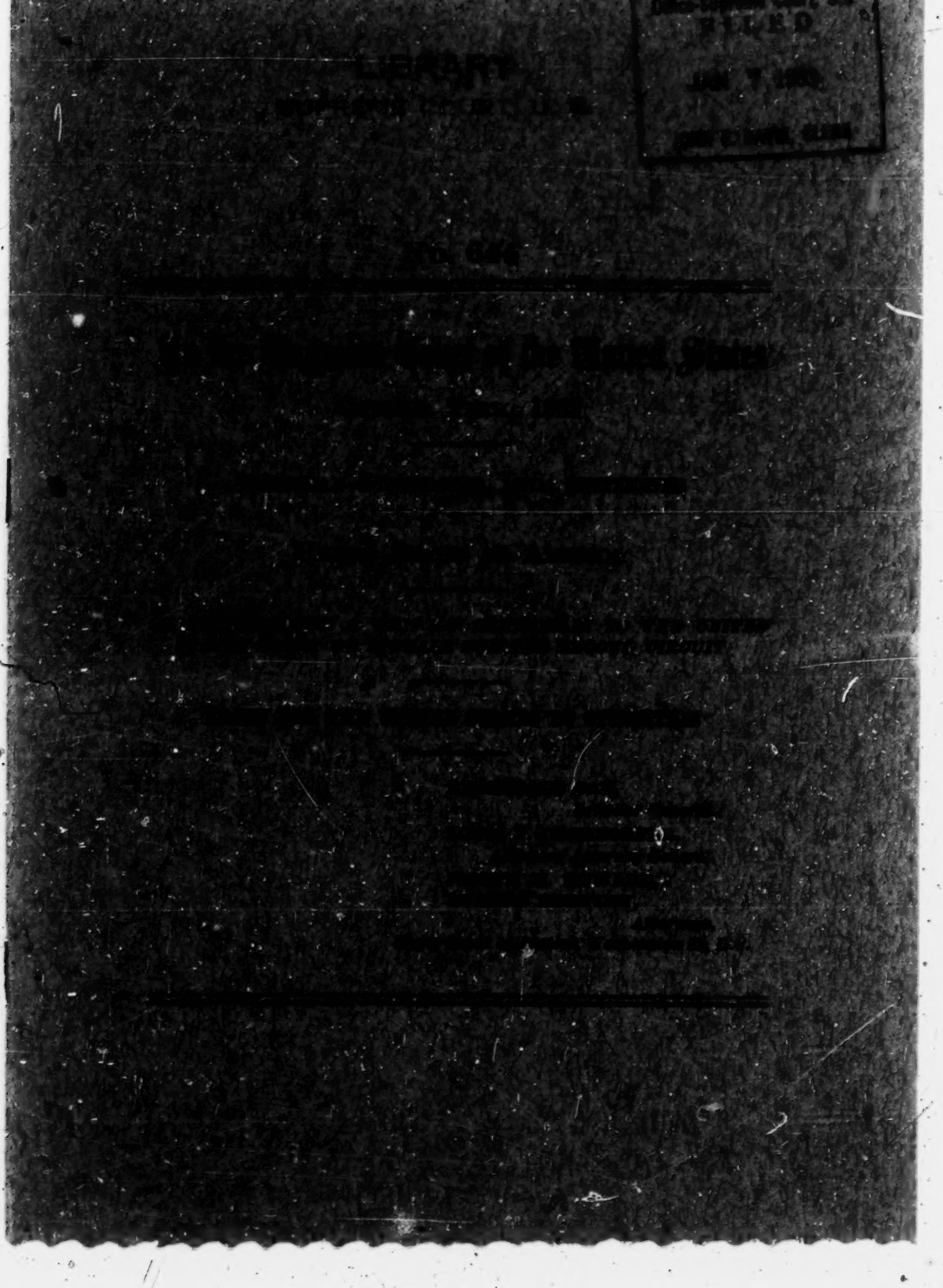

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670774—62

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 644

AMERICAN STEVEDORES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a–3a) has not yet been reported. The District Court wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on November 14, 1962. (Pet. 1a.) The petition for a writ of certiorari was filed on December 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a corporation was properly convicted of attempting to evade taxes for the years 1950 and

1951, even though three of its four officers and all of its stockholders were found not guilty.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 145(b).)

STATEMENT

On March 31, 1954, an indictment was returned in the Southern District of New York charging petitioner, American Stevedores, Inc., together with Diego Chiarello and his sons, Gus B. Chiarello, Joseph A. Chiarello, James Chiarello and Richard C. Chiarello, with attempting to evade a portion of the corporation's income taxes for the years 1950 and 1951, in violation of Section 145(b) of the Internal Revenue Code of 1939. Count One charged that the corporation and the five individual defendants wilfully failed

to report $31,869.50 in corporate net income for the year 1950, and wilfully attempted to evade and defeat $13,385.19 in income taxes for that year. Count Two charged that the corporation and the same individuals wilfully failed to report $34,463.08 in corporate net income for the year 1951, and attempted to evade and defeat the payment of $16,660.02 in income taxes for that year.[1]

Diego Chiarello moved before the trial for a severance on the ground of ill health. This motion was granted on January 27, 1962, and Diego Chiarello has not as yet been tried.

The jury found the corporation guilty on counts One and Two, and the four Chiarello brothers not guilty on Counts One through Ten.

American Stevedores, Inc., is a New York Corporation engaged in stevedoring work on the New York waterfront. (Stip. No. 1, R. 1860.)[2] The defendant Diego Chiarello, who has not as yet been tried, was president of the corporation, and three of his sons, who did stand trial, were the other officers and directors. The stock in the corporation was wholly owned by the four Chiarello brothers. (Stip. No. 1, R. 1860.)

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[1] Counts Three through Ten charged that each of the four Chiarello brothers, Gus B., Joseph, James and Richard C., had attempted to evade and defeat payment of their personal income taxes for the years 1950 and 1951.

[2] The appellant printed an insufficient appendix in the Court of Appeals, and the Government was given permission to use references to the original record in lieu of printing a full appendix. The original record in the Court of Appeals constitutes the record before this Court, and "R." references are to this record.

The corporation employed a comptroller, one Walter Gans. (R. 764.) Gans is a Certified Public Accountant, and has been comptroller in the corporation since 1929. (R. 764–765.) He testified that he was in charge of the corporation's accounting and bookkeeping, and that no one gave him instructions or directions as to what he should do pertaining to the accounting, bookkeeping and tax end of the business. Gans claimed that he had carte blanche in making all of the decisions pertaining to the books and records of the corporation, and that he never checked with any of the Chiarellos about them. (R. 776–777.) He also testified that he was solely responsible for the placing of expense items on the corporation's books. (R. 881–886.)

The corporation returns claimed ordinary and necessary business expenses in excess of $30,000 for each of the years 1950 and 1951. This money was, however, actually spent for the Chiarellos' personal accounts. The items were disguised on the books as corporate expenses, and deducted as Gear Room Expense, Stevedoring Materials and Supplies, Auto and Tractor, Office Expense, Entertainment, Travel, and General Expense, as shown by the following examples:

The corporation's pier and construction supervisor, Anthony Corio, a first cousin of the Chiarellos, installed plumbing, oil burners and similar equipment in the Chiarellos' homes, paid for the equipment, and was reimbursed by the corporation. These items were deducted by the corporation as gear room expenses, and Corio changed numerous invoices to make it appear that deliveries had been made to the corporation's

gear room, rather than the Chiarellos' homes. (R. 376–446.)

The corporation also deducted the wages of a caretaker, a Chiarello relative, who took care of the Chiarellos' summer homes in New Hampshire. These wages were also charged as gear room expenses. (R. 626–628, 646–647, 1226–1231.)

As part of its gear room and stevedoring materials expenses, the corporation also deducted numerous landscaping items which were delivered to the Chiarellos' homes. (R. 569–574.)

Another item was a large monument erected by the Chiarellos for their family burial plot in St. John's Cemetery engraved at the top with the word "Chiarello". This monument, costing $7,500, was paid for by the corporation and deducted as a general expense. (R. 529–532, 544–547.) Gans, the comptroller, tried to explain this as being a pension expense, although it was not deducted as such and the corporation did not make provision for it in its pension plan. (R. 787–789, 861–866, 920–922.)

The corporation also deducted, as office expenses, large numbers of appliances which had been delivered to the Chiarello homes, including television sets, washing machines, radios, luggage, sporting goods and carpets. (R. 246–266, 313–338.) Gans testified that these were properly deductible. For example, he stated that $2,837.17 worth of carpets, which had been installed in Diego Chiarello's home during the summer of 1950 (R. 246–266), were deductible as office expenses of the corporation because the corporation wanted to make Diego's home presentable for busi-

ness visitors who were expected at that time. (R. 859-861.)

The corporation appealed its conviction to the United States Court of Appeals for the Second Circuit, requesting reversal because of the alleged inconsistency between the jury's verdict of not guilty as to the four Chiarello brothers and guilty as to the corporation. The Second Circuit sustained the conviction in a *per curiam* opinion, holding that the verdicts were not inconsistent, and that, even if they were, there is no legal requirement of consistency. (Pet. 1a–3a.)

ARGUMENT

Petitioner appears to be raising, as it did in the Court of Appeals, the question of the consistency of the jury verdicts. As the court of appeals held (Pet. 3a), "even if the verdicts were inconsistent, it is well settled that consistency in these verdicts is not required." In support of this proposition, the Court cited *Dunn* v. *United States*, 284 U.S. 390, 393–394, and *United States* v. *Crosby*, 294 F. 2d 928 (C.A. 2d), certiorari denied *sub nom. Mittelman* v. *United States*, 368 U.S. 984. In the *Dunn* case this Court quoted with approval from *Steckler* v. *United States*, 7 F. 2d 59, 60 (C.A. 2d):

> * * * The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the de-

> fendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.

It is quite clear from the evidence that the jury in this case exercised a lenity "they had no right to exercise" in acquitting the Chiarellos, and that it was the defendants who benefited by any inconsistency in the verdicts.

Petitioner, citing no authority, claims the rule of law to be that a corporation cannot be convicted of a crime requiring wilfulness unless the jury finds the wilful acts constituting the crime were done by its officers and directors. (Pet. 6.) As the Court of Appeals held (Pet. 2a–3a), such is not the true rule. It is well established that a corporation is criminally accountable for the wilful act of any authorized employee acting in the scope of his authority. *New York Central R.R.* v. *United States*, 212 U.S. 481; *United States* v. *Steiner Plastics Mfg. Co.*, 231 F. 2d 149, 153 (C.A. 2d); *United States* v. *George F. Fish, Inc.*, 154 F. 2d 798 (C.A. 2d), certiorari denied, 328 U.S. 869. Walter Gans, the long-time comptroller of the corporation, had absolute authority over the corporation's books, and he made all decisions concerning them. Thus it is clear that the jury could properly have found the corporation guilty of wilfully attempting to evade its taxes because of Gans' acts in entering the personal expenses on the books so they could be fraudulently deducted by the corporation.

CONCLUSION

For the reasons presented above and apparent in the record, further review is unwarranted and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1963.